No. 98-671

(2)

Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1998

CITIZENS FOR A CONSTITUTIONAL CONVENTION, LET THE PEOPLE DECIDE, and MARK J. BENNETT, CHARLES S. FRUMIN, BOBBIE CARINIO, MARK R. SPENGLER, and JERRY BECK, on behalf of themselves and others similarly situated,

Petitioners,

v.

DWAYNE D. YOSHINA, Chief Election Officer of the State of Hawaii, MAZIE K. HIRONO, Lieutenant Governor of Hawaii, BENJAMIN J. CAYETANO, Governor of the State of Hawaii, in their official capacities; OFFICE OF ELECTIONS, STATE OF HAWAII; HAWAII STATE AFL-CIO, et al.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITIONERS' SUPPLEMENTAL BRIEF

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PETITIONERS' SUPPLEMENTAL BRIEF

Petitioners Citizens for a Constitutional Convention, et al., file this Supplemental Brief to call the Court's attention to intervening matters not available at the time the Petition for Certiorari was filed, and the effect of these new matters on the proper disposition of this case.

These intervening matters are: (a) the results of the November 3, 1998, general election vote upon whether there shall be a constitutional convention – the vote directed by Act 131, 1998 Haw. Sess. L.; and (b) the continued inaction by the Ninth Circuit upon Petitioners' July 7, 1998, Motions (1) to Transfer Plaintiffs' Claim for Attorneys' Fees to the District Court, or, in the Alternative, for Award of Attorneys' Fees on Appeal, (2) to Recall the Mandate, and (3) to Vacate the Judgment and Remand With Instructions.[1]

SUPPLEMENTAL STATEMENT

1. Pursuant to the directive of Act 131, 1998 Haw. Sess. L. (Pet. App. 270a), the constitutional convention question appeared again on the 1998 November general election ballot. As to that question, the Office of Elections, State of Hawaii, has reported as follows:[2]

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[1] These motions appear at Appendix P to the Petition.

[2] The following totals are taken from the Office of Elections' "Statewide Summary Report" dated November 4, 1998 (9:25 a.m.), a document which is a public record.

CONSTITUTIONAL CONVENTION QUESTION			
CONVENTION TO REVISE OR AMEND CONST[ITUTION]	YES	140688	34.1
	NO	244753	59.3
	Blank Votes	26784	6.8
	Over Votes	295	0.1

2. Meanwhile, the Ninth Circuit has failed to take any action upon Petitioners' July 7, 1998, Motions (1) to Transfer Plaintiffs' Claim for Attorneys' Fees to the District Court, or, in the Alternative, for Award of Attorneys' Fees on Appeal, (2) to Recall the Mandate, and (3) to Vacate the Judgment and Remand With Instructions. Indeed, the court of appeals has not even ruled upon a Motion to Expedite Decision on Pending Motions filed by Petitioners on October 9, 1998 (*see* Supp. App. A, *infra*), even though this motion was unopposed by Respondents.

SUPPLEMENTAL REASONS FOR GRANTING THE WRIT

Although the results of the November 3, 1998, vote do not fully moot this case, they point out, in a critical, added way, why this case has been fundamentally reshaped by Act 131, and why a GVR order, or, alternatively, an order granting plenary review, should issue. The lower court's complete inaction on Petitioners' July 7, 1998, motions also demonstrates forcefully why certiorari should be granted.

First, if they show nothing else, the results of the November 3, 1998, vote demonstrate just how important the *advance* knowledge of the supermajority rule announced in the *Yoshina* decision is to Hawaii voters – and would have been to those voters in 1996. Compared to the more than twelve percent who turned in blank ballots in 1996, less than seven percent of voters turned in blank ballots in 1998. Forced by the *Yoshina* rule to choose, Hawaii voters overwhelmingly voted "yes" or "no." They were not "don't care" voters, as disparagingly described by the court of appeals. This fact alone undermines the rationale of the judgment below.[3]

Second, the fact that the 1998 vote occurred, without more, furthers the claim that Petitioners are, at a minimum, at least partially "prevailing parties" within the meaning of 42 U.S.C. § 1988. Any past argument that Petitioners' claim for attorneys fees and costs was premature has been overtaken by the November vote itself. Petitioners prayed alternatively in the District Court for a new vote, and that vote has now occurred. Though the

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[3] The wide disparity in the 1996 and 1998 votes on the convention question only highlights the substantiality of Petitioners' claim for the remedy of a certification order as to the 1996 vote. Although Act 131 remedied one aspect of the unfairness visited by the *Yoshina* decision, it permitted the State unconstitutionally to "depreciate the votes" of those who voted in 1996 in favor of the constitutional convention by requiring those voters to win two elections instead of one, thus placing this case in diametrical conflict with *Roe v. Alabama*, 68 F.3d 404, 407 (11th Cir. 1995). The ability of the several vested interests opposing a convention to mount a campaign that resulted in fewer voters voting yes in 1998 than in 1996 only testifies to the incompleteness of "re-do" relief.

convention question did not pass in 1998, the 1998 plebescite, where rules for counting votes were clear beforehand, vindicated a basic purpose of the Due Process Clause of the Fourteenth Amendment – "the purpose of making an individual feel that the government has dealt with him fairly." *Williamson County Regional Planning Comm'n v. Hamilton Bank*, 473 U.S. 172, 196 n.14 (1985). *Accord*, *Griffin v. Burns*, 570 F.2d 1065, 1078 (1st Cir. 1978).

Third, as the Ninth Circuit's continued inaction makes painfully obvious, unless this Court grants the writ, the Due Process violation generated by the *state* courts, even if remedied by the state legislature, will be compounded by a Due Process violation generated by the *federal* courts as to the fees and costs issues that have arisen in this federal litigation. Petitioners are entitled as a matter of Due Process – the Due Process guaranteed by the Fifth Amendment – to have their claim for attorneys' fees and costs under § 1988 (and their claim for vacatur of the costs taxed against them) adjudicated on the merits by a federal court. *See Logan v. Zimmerman Brush Co.*, 455 U.S. 422, 433 (1982). The Ninth Circuit's continuing refusal to decide those important claims, which have been pending for approximately five months, forcefully counsels granting a writ of certiorari.

CONCLUSION

For the foregoing supplemental reasons and for those stated in the petition, the petition for certiorari should be granted, the judgment should be vacated, and the case

remanded to the Court of Appeals for further consideration of Petitioners' claims for equitable relief, attorneys fees, and other costs, in light of Act 131, its history, and the vote had on November 3, 1998, or with such other instructions as the Court finds appropriate.

In the alternative, the Court should grant plenary review as to the second question presented.

Respectfully submitted,

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December 3, 1998

SUPPLEMENTAL APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

MARK J. BENNETT, CHARLES S. FRUMIN, BOBBIE CARINIO, MARK R. SPENGLER, JERRY BECK, LET THE PEOPLE DECIDE, AND CITIZENS FOR A CONSTITUTIONAL CONVENTION, on behalf of themselves, and others similarly situated,	) Appeal Nos.) 97-16408 &) 97-16543)) D.C. Civ. No.) 97-00322) DAE) Hawaii) (Honolulu)
Plaintiffs-Appellees, Cross-Appellants,	))
vs.	)
DWAYNE D. YOSHINA, Chief Election Officer of the State of Hawaii, et al.,	))
Defendants-Appellants, Cross-Appellees.	))

(Filed Oct. 9, 1998)

PLAINTIFFS' MOTION TO EXPEDITE DECISION ON PENDING MOTIONS

Plaintiffs-appellees Mark J. Bennett, et al., respectfully move this Court pursuant to Fed. R. App. P. 27 and 28 U.S.C. § 1651 to expedite decision on the motions filed in Appeal Nos. 97-16408 and 97-16543 filed herein on July 7, 1998. These motions sought post-mandate relief in light of the enactment of legislation placing the constitutional convention question on the November general election

ballot in the State of Hawaii. Briefing of these motions was completed on August 11, 1998.[1]

Plaintiffs' timely-filed Petition for Rehearing in Nos. 97-16408 and 97-16543 was denied on June 23, 1998. On September 11, 1998, Associate Justice O'Connor extended the time, from September 21, 1998, to and including October 21, 1998, in which Plaintiffs may file a petition for certiorari seeking review of the judgment as to which rehearing was denied on June 23, 1998. Copies of the notice of Justice O'Connor's order and of the application for extension of time (without exhibits) are attached as Exhibits A and B.

Although the order extending time was issued upon consent, the Supreme Court rules indicate that an extension of time is generally disfavored. *See* U.S. S. Ct. R. 13.5. Plaintiffs' stated reasons for seeking an extension (in addition to the fact of consent) were as presented follows:

> An extension would grant the court below time to act and eliminate or drastically narrow any need to seek a writ of certiorari; it is also warranted because the federal merits issues herein are substantial, and, at a minimum, the judgment, if not altered below, plainly warrants review, if only for the purposes of vacating it in light of Act 131.

Exhibit B at 4-5 (footnote omitted).

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[1] Briefing of a related set of motions in the related attorneys' fee appeal, No. 98-15204, was completed on August 13, 1998. As Plaintiffs stated in that appeal, it is appropriate that these related motions be decided together with the pending motions in these appeals.

Having not received notice of this Court's action on the pending motions, Plaintiffs thus respectfully move the Court to expedite consideration of those motions so that the parties and the Supreme Court of the United States may timely have the benefit of this Court's decision.

If the Court cannot decide the pending motions prior to October 21, 1998, the deadline for the filing of the Petition for Certiorari, then at a minimum Plaintiffs respectfully pray that the Court act on the pending motions prior to November 6, 1998, two weeks prior to the initial deadline for the opposition to the petition for certiorari.[2] This Court's action by November 13, 1998, will permit Plaintiffs to file, in advance of the Defendants' deadline for filing of the opposition to certiorari, a supplemental brief pursuant to Sup. Ct. R. 15.8 explaining to the Supreme Court the significance of this Court's ruling on the pending motions, including, if appropriate, the fact that this Court has mooted the need to grant review here.

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[2] As a condition of consenting to Plaintiffs' request for extension of time to petition for certiorari, Defendants requested Plaintiffs' anticipatory consent to a 30-day extension of time in which to file the opposition to the petition for certiorari, if Defendants so requested after the petition was filed. That consent has been given and is reaffirmed here.

Dated: New York, New York, October 8, 1998.

McCORRISTON MIHO MILLER MUKAI
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[EXHIBIT DELETED]